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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1648

IGOR A. IVANOV, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. A) is reported at 494 F. 2d 593. The prior panel opinion of the court of appeals (Pet. App. D) is not officially reported. The opinions of the district court are reported at 318 F. Supp. 66 and 342 F. Supp. 928.

JURISDICTION

The judgment of the court of appeals *en banc* (Pet. App. B) was entered on March 5, 1974. On March 28, 1974, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including May 4, 1974, and the petition was filed on May 3, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is constitutionally permissible to conduct a warrantless electronic surveillance for the purpose of gathering foreign intelligence information.

2. Whether evidence of criminal activity incidentally intercepted during the course of a warrantless foreign intelligence surveillance may be introduced in a criminal trial after an *in camera* determination that the surveillance was reasonable because its purpose was in fact foreign intelligence gathering.

3. Whether Section 605 of the Federal Communications Act of 1934, prior to its amendment in 1968, barred the government from introducing the fruits of a warrantless foreign intelligence surveillance in a criminal trial.

4. Whether the government carried its burden of showing that certain illegal electronic surveillances had not tainted petitioner's conviction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the Constitution and Section 605 of the Federal Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. (1964 ed.) 605, are set forth at Pet. 4–6.

STATEMENT

1. Petitioner, a Soviet national, and co-defendant John Butenko were charged with having conspired, from April to October 1963, to violate the federal

espionage statute, 18 U.S.C. 794(a) and (c) (count I)[1] and with having conspired to violate the statutory prohibition against acting as an agent of a foreign government without prior notification to the Secretary of State, 18 U.S.C. 951 (count II).[2] Following a jury trial in the United States District Court for the District of New Jersey,[3] petitioner and Butenko were convicted on all counts. Petitioner was sentenced to concurrent terms of twenty years' imprisonment on count I and five years' imprisonment on count II.[4] The court of appeals affirmed petitioner's conviction on count I but reversed his conviction on count II and directed that a judgment of acquittal be entered on that count. *United States* v. *Butenko*, 384 F. 2d 554 (C.A. 3).[5]

Petitioner then filed a petition for a writ of certiorari and, while the case was pending, the Solicitor General disclosed to this Court that both petitioner and Butenko had been overheard pursuant to electronic surveillances. In response to that disclosure, this Court remanded the case to the district court for

[1] Briefly, the evidence on this count disclosed "a scheme to transmit to the Union of Soviet Socialist Republics the plan of a command and control system of the Strategic Air Command (SAC)" (Pet. App. A, p. 39a).

[2] Butenko was also charged with a substantive violation of Section 951 (count III).

[3] Petitioner and Butenko had been arrested on October 29, 1963, and the indictment against them was returned on November 7, 1963. The trial concluded on December 2, 1964.

[4] Butenko was sentenced to concurrent terms of thirty years' imprisonment on count I and ten years' imprisonment on counts II and III.

[5] Butenko's convictions on the three counts were affirmed.

"a hearing, findings, and conclusions (1) on the question of whether with respect to any petitioner there was electronic surveillance which violated his Fourth Amendment rights, and (2) if there was such surveillance with respect to any petitioner, on the nature and relevance to his conviction of any conversations which may have been overheard through that surveillance." *Alderman* v. *United States,* 394 U.S. 165, 186.

2. On remand, the government disclosed that there had been five electronic surveillances in which petitioner had been overheard (318 F. Supp. at 68; 342 F. Supp. at 931). The government provided petitioner's counsel with the logs of two of those surveillances, designated in the record as 4001–S* and 4002–S*; surveillance 4001–S* was directed at one Vladimir Karatsuba, and surveillance 4002–S* was directed at petitioner. Both commenced on May 7, 1963; 4002–S* was discontinued on or about June 18, 1963, and 4001–S* on September 10, 1963 (342 F. Supp. at 930).* The government conceded the illegality of these two surveillances for purposes of the taint hearing

* Karatsuba was believed by the Federal Bureau of Investigation to be an active Soviet intelligence agent, and the primary reason for instituting the surveillances was to gather information concerning his activities. Subsequent to commencement of an investigation of Karatsuba, petitioner was observed to be involved in what was thought to be an intelligence operation. During the period of electronic surveillance, petitioner and Karatsuba occupied adjoining apartments, and electronic surveillance was directed at each of these apartments. The district court assumed, "[f]or the purposes of this case," that these surveillances, 4001–S* and 4002–S*, were directed solely at petitioner (342 F. Supp. at 930, n. 2).

(*ibid.*), but refused to disclose logs of other of petitioner's conversations, intercepted on wiretaps at three separate premises, maintaining that these surveillances were lawful and representing that they were not directed at petitioner. The overheard conversations (Gov. Exs. A(1), A(2) and A(3)), along with the authorizations by the Attorney General for the surveillances (Gov. Ex. B), were sealed and submitted to the district court *in camera* (318 F. Supp. at 68, n. 3).

a. Following disclosure of the logs for surveillances 4001–S* and 4002–S*, extensive hearings were conducted in order to ascertain whether petitioner's conviction had in any manner been tainted by these intercepts (342 F. Supp. at 930). Testimony was received from eight F.B.I. agents who had supervised or conducted the investigation of petitioner, including the electronic surveillances, and from the Assistant United States Attorney who prosecuted the case. In addition, stipulations with respect to the testimony of twenty-one other F.B.I. agents were received in evidence (*ibid.*).

A summary of the evidence adduced at the hearings is set forth in the opinion of the district court (342 F. Supp. at 931–936). The large volume of evidence exhaustively recounted the details of the investigation, as it related to the electronic surveillances, including the relevant investigatory procedures. On the basis of this evidence, the district court concluded that the surveillances in question had been wholly unproductive (*ibid.*).

The only other significant evidence related to the erasure of the surveillance tapes. It was established

that in 1963, and until 1968, it was standard F.B.I. procedure to erase surveillance tapes and maintain their contents by summary entries. Tapes would be maintained for a period of two weeks, after which time they were erased in the absence of a court order or some other reason for maintaining them. This procedure, which enabled the reuse of tapes, was followed in order to save both space and expense (342 F. Supp. at 931–932). The F.B.I. agent directly in charge of these monitorings, Lawrence McWilliams, had instructed those who actually conducted the monitorings to maintain rather than erase any tape containing information of value. The monitoring agents were under instructions to report to McWilliams if anything of value was overheard and he, McWilliams, would make the final determination whether to maintain a particular tape. McWilliams never received any such reports with respect to petitioner's conversations; all reports received indicated that the monitoring was unproductive. Accordingly, no tapes of petitioner's conversations were preserved because nothing of investigative value was produced by the surveillances (342 F. Supp. at 933–934).

The district court concluded that "the evidence adduced at the hearing conclusively shows that Ivanov's conviction was not in any way tainted by reason of the unlawful electronic surveillances conducted by the Government" (342 F. Supp. at 931; and see *id.* at 936–939). The court also rejected petitioner's claim that log summaries for certain days were missing (342 F. Supp. at 939–941). Petitioner's contentions

that erasure of the tapes constituted "affirmative evidence of taint" and that a new trial was required because the erasures allegedly deprived him of potentially exculpatory evidence were likewise rejected (342 F. Supp. at 939–942).

b. With respect to the three additional surveillances, pursuant to which certain of petitioner's conversations were intercepted, the district court, on the basis of "its in camera examination of Government's Exhibits A(1), A(2), A(3) and B," found (318 F. Supp. at 72):

> 1. that the surveillances here under attack were expressly authorized by the Attorneys General shown in the exhibits;
>
> 2. that they were not made pursuant to a surveillance of the defendant Ivanov;
>
> 3. that said surveillances were directed against certain premises in which Ivanov had no interest, the description and location of said premises being set forth in the exhibits;
>
> 4. that said surveillances were conducted and maintained solely for the purpose of gathering foreign intelligence information;
>
> 5. that it was reasonable and necessary to authorize such surveillances in the national interest; and
>
> 6. that it would prejudice the national interest to make a disclosure of the particular facts concerning said surveillances.

The district court concluded that the surveillances, conducted without a warrant, constituted a reasonable exercise of the President's power to gather foreign intelligence information and, as such, did not violate

the Fourth Amendment (318 F. Supp. at 69–72). The court also held that disclosure of the intercepted conversations was not required (318 F. Supp. at 69–70, 72). Finally, the district court concluded that these surveillances were not conducted in violation of the Communications Act of 1934, 47 U.S.C. 605 (318 F. Supp. at 72–74).

3. On appeal, a divided panel of the court of appeals held that Section 605 of the Communications Act, 47 U.S.C. 605, barred any use of the fruits of foreign intelligence electronic surveillances in petitioner's trial. But the panel unanimously affirmed the district court's holding that electronic surveillances 4001–S* and 4002–S* had not tainted petitioner's conviction (Pet. App. D, pp. 97a–100a, 110a). The government petitioned for a rehearing with respect to that portion of the panel's opinion that held that Section 605 barred the use of the fruits of foreign intelligence electronic surveillance in a criminal trial, and the petition was granted.[7] On rehearing *en banc* the court, with four judges dissenting, concluded that the surveillances and the use of the fruits thereof to procure evidence against petitioner, assuming that such use occurred, violated neither Section 605 nor the Fourth Amendment, and that the district court therefore properly refused to order disclosure of the

[7] Petitioner also filed a petition for rehearing, conditioned upon grant of the government's petition, seeking review of that portion of the panel's opinion which dealt with electronic surveillances 4001–S* and 4002–S*; that petition was denied (Pet. App. A, p. 4a).

wiretap logs to petitioner and his counsel (Pet. App. A).[8]

DISCUSSION

1. The principal issues involved in this case are whether it is constitutionally permissible to conduct a warrantless electronic surveillance for the purpose of gathering foreign intelligence information, and whether evidence of criminal activity incidentally intercepted thereby may be introduced in a criminal trial after an *in camera* determination that the purpose of the surveillance was in fact foreign intelligence gathering. We agree with petitioner that these important questions are presented in this case and should be decided by the Court.[9]

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[8] Judges Seitz, Aldisert and Van Dusen dissented on the grounds that any use of information gleaned from these surveillances to obtain evidence against petitioner constituted a violation of Section 605 (Pet. App. A, pp. 24a-58a); Judge Gibbons is the only judge who dissented on Fourth Amendment grounds (*id.* at 58a-86a).

[9] The relevant electronic surveillances occurred at various periods between 1962 and December 2, 1964, well before the Court's decision in *Katz* v. *United States*, 389 U.S. 347. Accordingly, the protection of the Fourth Amendment would not extend to these surveillances "unless there was an 'actual intrusion into a constitutionally protected area.'" *Desist* v. *United States*, 394 U.S. 244, 248, quoting *Silverman* v. *United States*, 365 U.S. 505, 512. However, in the district court the government, expressly stating that it did not rely upon pre-*Katz* law and thus would not seek to establish that the three surveillances (submitted to the court *in camera*) were valid under the law prevailing at the time they were conducted (318 F. Supp. at 70), presented no evidence on whether there was an "actual intrusion" or trespass into the premises under surveillance, and the district court made no determination on that point. Presumably petitioner relied upon the government's disavowal, and the court of appeals concluded that "the government's posture obviates the need to review the procedure by which the surveillance devices were installed" (Pet.

a. This case presents a question left unresolved by the Court in *United States* v. *United States District Court*, 407 U.S. 297, 321–322, n. 20: Whether warrantless electronic surveillances are constitutionally permissible for the gathering of foreign intelligence information. Petitioner Ivanov is a Soviet national; the Attorney General has certified, petitioner does not deny, and the district court found that the surveillances here "were conducted and maintained solely for the purpose of gathering foreign intelligence information" (318 F. Supp. at 72); and petitioner in fact stands convicted of having violated the federal espionage statute, 18 U.S.C. 794(a) and (c).

In such circumstances and consistent with the Fourth Amendment's reasonableness requirement, a President through his Attorney General may authorize electronic surveillance without prior judicial approval under his constitutional authority to conduct foreign relations and to protect our national security;[10] the propriety of what may be done in the

App. A. p. 16a, n. 39). Though we continue to disavow reliance upon pre-*Katz* law, we think it incumbent upon us to advise the Court, based upon information which we have now received, that, had the trespass issue arisen below, we would have contended that there was no trespass in the installation of the wiretapping devices involved here. Since in our view there was no physical intrusion into the area under surveillance, petitioner's interest in that area (the district court concluded that he had none: see 318 F. Supp. at 72) was irrelevant under the law as it existed prior to *Katz*. Under current law, petitioner has standing to raise the wiretapping issue because the government has conceded that his conversations were in fact overheard. See *Alderman* v. *United States*, *supra*, 394 U.S. at 176–180. In any event, we deem ourselves bound here by the government's express representation below that it did not rely upon pre-*Katz* law.

[10] The Fourth Amendment forbids only "unreasonable searches and seizures." Both on historical and practical grounds one

exercise of this authority is not subject to prior judicial scrutiny. See *United States* v. *Belmont*, 301 U.S. 324, 328; *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111; *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 319–322. "To fulfill these [foreign policy] responsibilities," the court of appeals noted in this case (Pet. App. A, p. 11a):

> the President must exercise an informed judgment. Decisions affecting the United States' relationships with other sovereign states are more likely to advance our national interests if the President is apprised of the intentions, capabilities and possible responses of other countries. Certainly one means of acquiring information of this sort is through electronic surveillance.

As Commander-in-Chief and the primary agent for the administration of the nation's foreign affairs, the President must make the delicate, complex, political judgments, based on foreign policy considerations, as to what threatens our national security and whether in a particular case it is necessary and reasonable to conduct electronic surveillance. As the district judge stated (318 F. Supp. at 72):

> It is obvious that in making a determination to use wiretapping in a particular case, the President or the Attorney General must make a judgment based on foreign policy considera-

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must conclude that the surveillances involved here are not unreasonable; for, "while the Constitution protects against invasions of individual rights, it is not a suicide pact." *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 160.

> tions. It would be unrealistic to impose upon a judicial officer the burden of deciding what does or does not constitute a threat to our national security. That decision should be left with the executive branch of the Government, which alone possesses the necessary expertise and factual data to assess the reasonableness of electronic surveillances in any given case and the need therefor.

The court of appeals agreed with the district judge, and every other court which has considered the issue has approved warrantless electronic surveillance for the gathering of foreign intelligence information as reasonable and constitutional. See *United States* v. *Brown*, 484 F. 2d 418, 425–427 (C.A. 5), certiorari denied, March 4, 1974, No. 73–5620; *United States* v. *Clay*, 430 F. 2d 165 (C.A. 5), reversed on other grounds, 403 U.S. 698; *Zweibon* v. *Mitchell*, 363 F. Supp. 936, 942–944 (D. D.C.); *United States* v. *Hoffman*, 334 F. Supp. 504, 507–508 (D. D.C.). See also *Katz* v. *United States*, *supra*, 389 U.S. at 363–364 (White, J., concurring); *Giordano* v. *United States*, 394 U.S. 310, 314–315 (Stewart, J., concurring); Rogers, *The Case for Wiretapping*, 63 Yale L.J. 792, 797–798 (1954).[11]

[11] Petitioner contends (Pet. 27–29) that at oral argument of this case before the Court on October 14, 1968, the Solicitor General conceded the illegality of all the electronic surveillances that resulted in the interception of petitioner's conversations. Assuming, *arguendo*, that any such concession was made (the district court, however, concluded that none was (see 318 F. Supp. at 69)), it is nevertheless clear that this Court did not accept that concession. Instead, the Court expressly remanded the case for a determination, *inter alia*, whether in fact the

b. If an electronic surveillance which was authorized for purposes of foreign intelligence gathering incidentally turns up evidence of criminal activity, such evidence may be introduced in a criminal trial because the surveillance itself was constitutional. See 18 U.S.C. 2511(3); ABA Standards for Criminal Justice, *Electronic Surveillance* (Approved Draft 1971), § 3.2 and commentary. All that the Fourth Amendment requires is a determination that the purpose of the surveillance was foreign intelligence gathering, a fact which petitioner did not challenge in the court of appeals (Pet App. A, p. 22a).[12]

That determination (where it is in issue) can appropriately be made *in camera*, without a turn-over of the materials to the defendant.[13] As the Court made

challenged surveillances were unlawful. *Alderman* v. *United States*, *supra*, 394 U.S. at 186. Indeed, as Mr. Justice Stewart noted with respect to this case in his concurring opinion in *Giordano* v. *United States*, *supra*, 394 U.S. at 313–314, n. 1: "In deciding those cases, the Court declined to accept the Solicitor General's proferred concession." Thus the concession, if any, is not now binding on the government.

[12] Accordingly, petitioner is seemingly foreclosed from making the argument made at pages 20 and 21 of the Petition. Whatever the soundness of the passage there quoted from an earlier submission by the United States (which we do not now repeat), suggesting the arguable "inability of the defendant to traverse effectively the government's allegation that the underlying surveillance was undertaken for national security reasons," that issue is presumably removed from the case by petitioner's failure to contest the district court's finding on appeal.

[13] Judge Adams, the author of the *en banc* opinion, suggested in his dissenting opinion as a member of the original three-judge panel (Pet. App. D, pp. 126a-128a; footnote omitted):

explicit when this case was last before it, the requirement that certain products of electronic surveillance be disclosed to a criminal defendant and his counsel is limited to situations where the surveillance violated the Fourth Amendment. "Nothing in *Alderman* v. *United States, Ivanov* v. *United States,* or *Butenko* v. *United States,* [394 U.S. 165], requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance." *Taglianetti* v. *United States,* 394 U.S. 316, 317. See also *Giordano* v. *United States, supra,* 394 U.S. at 314 (Stewart, J., concurring). The task of determining whether the purpose of a surveillance was foreign intelligence gathering is clearly not "too complex" nor is "the margin for error too great to rely wholly on the *in camera* judgment of the trial court." *Alderman* v. *United States, supra,* 394 U.S. at 182. Rather, in a field as delicate and sensitive as foreign intelligence gathering, there is every reason to proceed *in camera* and without disclosure. Cf.

"[T]he test of 'reasonableness' in such cases should be the relationship between the search and the President's foreign affairs power. Before the contents or fruits may be used in a judicial proceeding, the government should have to demonstrate to the satisfaction of the trial judge *in camera* that the electronic surveillance was, in fact, related to the Chief Executive's foreign affairs authority. Once such a showing has been made, a conclusion that the wiretap was 'reasonable,' and thus constitutional, would be appropriate. On the other hand, should the government fail to demonstrate satisfactorily a relationship between the surveillance and the President's foreign affairs power, the court would properly find that the tap was illegal and order full disclosure to the defendant for a hearing upon the taint issue."

United States v. *Lemonakis*, 485 F. 2d 941, 963 (C.A.D.C.).

2. Before reaching the important question of the admissibility in evidence of the fruits of warrantless foreign intelligence electronic surveillance, the Court must first consider petitioner's contention (Pet. 21–22) that the interception and divulgence of his telephone conversations violated Section 605 of the Communications Act of 1934, 47 U.S.C. 605.

Prior to the 1968 amendment Section 605 provided that "[n]o person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person."[14] While no explicit exception to this provision is set forth in the statute, it is clear that Section 605 is not and was not concerned with proscribing surveillances conducted for the purpose of gathering foreign intelligence information. There is nothing in the legislative history to indicate that Congress considered the matter, and it cannot be assumed that Congress intended to prohibit wiretaps authorized by

[14] We adhere to the view, first expressed by Attorney General Jackson, that Section 605 proscribes only the interception *and* public divulgence of the contents of any wire communication. See Brownell, *The Public Security and Wiretapping*, 39 Cornell L. Q. 195, 197–200 (1954). There must be both an interception and a divulgence, and the divulgence does not include one solely within the Department of Justice; nor is it clear that the divulgence prohibited includes a divulgence of the fruits of an interception without divulging its existence, contents, etc. See *Benanti* v. *United States*, 355 U.S. 96, 100, n. 5; *Rathbun* v. *United States*, 355 U.S. 107, 108, n. 3.

the President or Attorney General for such foreign intelligence purposes.[15]

The opinion of the Court in *Nardone* v. *United States*, 302 U.S. 379, does not indicate one way or the other whether foreign intelligence wiretapping was intended to be proscribed by Section 605, for the issue was not before the Court in that case.[16] Nor can the Second Circuit's opinion in *United States* v. *Coplon*, 185 F. 2d 629, be considered dispositive of the issue (Pet. App. A, pp. 12a–13a; Pet. App. D, pp. 116a–

[15] It is not surprising that Congress did not consider the question of foreign intelligence wiretapping in 1934, for it was not until May 21, 1940 that President Roosevelt sent a confidential memorandum to Attorney General Jackson authorizing electronic surveillance in cases "involving the defense of the nation." The practice of authorizing the use of electronic surveillance where national security is involved was later expressly approved by President Truman and has been sanctioned by all succeeding Attorneys General. See Rogers, *The Case for Wiretapping*, *supra*, 63 Yale L. J. at 795–796. "Since 1941, Attorneys General have advised Congress of their construction, and Congress has taken no action indicating disagreement." *United States* v. *Stone*, 305 F. Supp. 75, 81 (D. D.C.). Indeed as recently as September 12, 1973, in a letter to the Chairman of the Senate Foreign Relations Committee, Attorney General Richardson expressed his intention to continue this policy of the Department of Justice: "I believe that we are justified in relying on the case law as it is being developed in the lower courts to conduct national security electronic surveillance, without warrant, in a limited number of cautiously and meticulously reviewed instances." Hearings before the Senate Committee on Foreign Relations on Nomination of Henry A. Kissinger to be Secretary of State (Pt. 1), 93d Cong., 1st Sess. 55.

[16] A few years after this Court's *Nardone* opinions, in the confidential memorandum from President Roosevelt to Attorney General Jackson (*supra*, n. 14), the President stated: "I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation."

117a). Given this paucity of legislative and judicial authority to the contrary, we submit that Section 605 did not render unlawful the surveillances at issue here which "were conducted and maintained solely for the purpose of gathering foreign intelligence information" (318 F. Supp. at 72).[17] As the court of appeals stated in its opinion (Pet. App. A, pp. 11a–12a; footnote omitted):

> In enacting § 605, the Congress did not address the statute's possible bearing on the President's constitutional duties as Commander-in-Chief and as administrator of the nation's foreign affairs. The Senate and House reports suggest that the purpose of the Communications Act was to create a commission with regulatory power over all forms of electrical communications, whether by telephone, telegraph, cable or radio. There appears to have been little or no discussion at all in Congress regarding § 605. * * * In the absence of any indication that the legislators considered the possible effect of § 605 in the foreign affairs field, we should not lightly ascribe to Congress an intent that § 605 should reach electronic surveillance conducted by the President in furtherance of his foreign affairs responsibilities.[18]

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[17] Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510, *et seq.*, which included an amendment to Section 605, made explicit that nothing in that Section or in Title III itself was intended to limit the President's authority to engage in foreign intelligence electronic surveillance, and that the only limitations on his authority are those imposed by the Constitution. See 18 U.S.C. 2511(3).

[18] Because Attorney General Kennedy in 1962 requested more explicit surveillance authority from Congress, and in doing so,

See also the cases cited in note 30 of the court's opinion (Pet. App. A, p. 12a); and see *United States* v. *O'Baugh*, 304 F. Supp. 767 (D. D.C.); *United States* v. *Stone*, *supra*, n. 15.[19]

3. Petitioner also contends (Pet. 29–32) that the government failed to carry its burden of showing that the first set of surveillances (4001–S* and 4002–S*), conceded by the government for purposes of the taint hearing to have been illegal and therefore disclosed to petitioners, did not taint his conviction.

a. First, petitioner contends that on remand the government was obligated to demonstrate that it had an independent source for the evidence adduced at trial, and particularly for any evidence concerning petitioner's activities on dates when the surveillance was in effect. However, it is clear that the government need not show an independent source for evi-

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suggested that Section 605 as then written barred use of intercepted espionage evidence in criminal trials, petitioner now contends (Pet. 22–24) that that view of Section 605 necessarily governs his prosecution, which was begun while Kennedy was still Attorney General. But the Executive is not estopped from urging Congress to expand its statutory powers while at the same time asking the courts to interpret existing powers expansively; nor, obviously, are the courts bound by the Attorney General's description to Congress of his understanding of the scope of his powers.

[19] Petitioner further discusses (Pet. 32–33) whether 18 U.S.C. 3504 would govern the district court's review of the surveillance records should this Court determine that the interceptions violated Section 605. That question was not reached by the court of appeals and we do not find it necessary to address it here; we generally agree, however, with Judge Gibbons' conclusion (Pet. App. A, pp. 78a–86a) that 18 U.S.C. 3504 would govern any remand in this case.

dence adduced at trial until there is at least some showing that the evidence at trial was tainted by the illegal conduct:

> The United States concedes that when an illegal search has come to light, it has the ultimate burden of persuasion to show that its evidence is untainted. But at the same time petitioners acknowledge that they must go forward with specific evidence demonstrating taint. "[T]he trial judge must give opportunity, however closely confined, to the accused to prove that a substantial portion of the case against him was a fruit of the poisonous tree. This leaves ample opportunity to the Government to convince the trial court that its proof had an independent origin." [*Alderman* v. *United States*, *supra*, 394 U.S. at 183, quoting *Nardone* v. *United States*, 308 U.S. 338, 341.]

Here, petitioner made no demonstration of taint, and the government presented overwhelming evidence that "conclusively show[ed] that Ivanov's conviction was not in any way tainted by reason of the unlawful electronic surveillances conducted by the Government" (342 F. Supp. at 931). It is therefore clear that the government more than met the applicable burden.

b. Petitioner next contends that the erasure of the tapes, the contents of which are reflected in the log summaries for surveillances 4001–S* and 4002–S*, and the alleged fact that certain log summaries from surveillance 4002–S* were missing, constitute affirmative evidence of taint. This contention, as it relates to the

erasures, was properly rejected in the opinion of the district court:

> The monitoring Agents were specifically instructed to preserve any tape containing information of intelligence value, and to report same to their supervisors. It is assumed the Agents followed orders, and they so testified. The record is crystal clear that nothing of any investigative value resulted from the monitoring. The absence of verbatim transcripts and destruction through the erasure of the tape recordings cannot, in this context, be considered affirmative evidence of taint. The instructions given to the monitoring agents were fully consistent with the then prevailing FBI practice regarding the use of logs in ongoing investigations and the erasure or destruction of ineffective or innocuous tapes after their transcription into log summaries. No evidence was adduced at the hearing in the instant case that such practice lacked authenticity or completeness. [342 F. Supp. at 940; see also *id.* at 941–542.]

Petitioner's factual allegation that certain log summaries were missing was thoroughly examined and rejected by the original panel of the court of appeals in an opinion upon which we rely (Pet. App. D, pp. 97a–100a).[20] See also 342 F. Supp. at 940–941. That factual issue warrants no further review.[21]

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[20] As noted, petitioner's petition for rehearing to review the panel's holding on that point was denied (Pet. App. A, pp. 4a–5a).

[21] Petitioner attempts also to contest the validity of certain additional interceptions of petitioner's conversations which were

CONCLUSION

For the foregoing reasons, we do not oppose the granting of the petition for a writ of certiorari, limited to questions 1 and 2 of the petition (corresponding to questions 1, 2 and 3 of this memorandum).

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made after December 2, 1964, the date of his conviction (Pet. 24–26). Contrary to petitioner's suggestion, those interceptions were outside the scope of this Court's remand to the district court to determine whether illegal surveillances had tainted petitioner's conviction. See *Alderman* v. *United States*, *supra*, 394 U.S. at 186. Evidence obtained as a result of the surveillance of post-conviction conversations obviously could not have tainted the conviction. Apparently implicit in petitioner's argument is a claim of possible post-conviction interference with his Sixth Amendment right to counsel, but that claim is not properly cognizable in this proceeding. Petitioner's remedy with respect to that claim is to bring a collateral action for relief under 28 U.S.C. 2255.

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